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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., et al.,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In determining whether a federal agency's decision not to prepare an Environmental Impact Statement violates the provisions of the National Environmental Policy Act, should a "reasonableness" or an "arbitrary and capricious" standard of review be applied by lower federal courts?

2. Did the Court of Appeals err in holding that where a permit applicant claims there are no feasible alternatives to its proposed project, a federal agency may disregard its statutory duty to assess alternatives unless an environmental plaintiff proposes a feasible alternative overlooked by the applicant?

LIST OF PARTIES

The following is a list of all parties involved in this application for a Writ of Certiorari:

A. PETITIONERS:*

1. River Road Alliance, Inc.
2. Coalition for the Environment, Inc.
3. New Piasa Chautauqua, Inc.
4. Charles F. Hobbs
5. People of the State of Illinois.

B. RESPONDENTS:

1. Corps of Engineers of the United States Army
2. John O. Marsh, Jr., individually and as Secretary of the Army
3. William R. Gianelli, individually and as Assistant Secretary of the Army for Civil Works
4. Lt. Gen. Joseph K. Bratton, individually and as Chief of Engineers, Corps of Engineers of the United States Army
5. Col. Gary D. Beech, individually and as District Engineer for the St. Louis District, Corps of Engineers of the United States Army
6. National Marine Service Incorporated

* Petitioners River Road Alliance, Coalition for the Environment, New Piasa Chautauqua and Charles F. Hobbs are filing a separate petition.

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OPINIONS BELOW

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Wood are reported at 764 F.2d 445 and are reproduced in the Appendix at App. 1-23. The judgment of the United States District Court for the Southern District of Illinois is not reported and is reproduced in the Appendix at App. 28-36. The Environmental Assessment of the Corps of Army Engineers and its findings of fact are reproduced in the Appendix at App. 38-67.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 17, 1985. Timely petitions for rehearing with suggestions for rehearing *en banc* were denied on August 8, 1985; five Circuit Judges voted, however, to grant rehearing in this case. (App. 26-27). This petition for a Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED*

42 U.S.C. §4332(1)

42 U.S.C. §4332(2)(A)

42 U.S.C. §4332(2)(B)

42 U.S.C. §4332(2)(C)

42 U.S.C. §4332(2)(E)

33 C.F.R. Part 230, Appendix B, par. 8(a)

33 C.F.R. Part 230, Appendix B, par. 8(b)

40 C.F.R. §1506.5(a)

40 C.F.R. §1506.5(b)

* These statutory provisions and regulations are set forth in the separately bound Appendix to this petition at App. 71-74.

STATEMENT OF THE CASE

On October 5, 1982, the United States Army Corps of Engineers ("Corps") granted National Marine Service, Inc. ("NMS") a permit authorizing the exclusive, private use by NMS of a five-acre portion of the Mississippi River as a barge fleeting area. The Corps granted this permit on the basis of an Environmental Assessment ("EA") and certain supplemental findings of fact ("FOF"), in which the Corps concluded that the project would not significantly affect the quality of the human environment, thereby making unnecessary the preparation of an environmental impact statement ("EIS") for this project.[1]

Substantial public and official opposition was voiced over the location of NMS's project in an area which combines many nationally and regionally recognized unique and significant features. The opposition sought to prevent degradation of these features, including the loss of outstanding scenic vistas and the destruction of certain increasingly rare aquatic life and essential aquatic habitat. This opposition culminated in the filing by petitioners of the cases at bar, one filed by River Road Alliance, Inc. and other public interest groups and concerned citizens ("Alliance"), and the second filed by the Attorney General for the State of Illinois on behalf of the People of the State of Illinois at the request of the Illinois Department of Conservation ("State"). The plaintiffs challenged

[1] NMS's desire for this fleeting facility was due in part to congestion at one of the locks on the Mississippi River which is being replaced. Construction on the lock is estimated to be completed some time in 1988. NMS's permit would supposedly expire at that time. (Administrative Record, Volume I, p. 316, hereafter "AR, Vol. ____, p. ____."

the Corps' non-compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, *et seq.*, and the Corps' own regulations 33 C.F.R. Parts 230 and 320-325. Jurisdiction of the State's suit was based on 5 U.S.C. §702 and 28 U.S.C. §1331. Jurisdiction of Alliance's suit was based on 5 U.S.C. §702, 28 U.S.C. §§1331(a), 1337, 1361, and 16 U.S.C. §§1504(c) and (g)(1).

The District Court for the Southern District of Illinois ruled: (1) that the Corps' evaluation of the project's environmental impacts was inadequate to justify the Corps' finding of no significant impact, in violation of section 102(2)(C) of NEPA; (2) that the Corps' evaluation of impacts violated its own regulations; and (3) that the Corps failed to assess alternatives to the project in violation of section 102(2)(E), its own regulations, and those issued by the Council on Environmental Quality. (District Court Opinion, App. at 32-35).

In a split decision the Seventh Circuit Court of Appeals reversed the District Court, holding that the consideration given by the Corps to environmental impacts was neither arbitrary nor capricious. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 449-452 (7th Cir. 1985). (Seventh Circuit Opinion, App. at 6-12) The Seventh Circuit further held that the Corps' failure to consider alternatives was excusable. 764 F.2d at 452-453. (App. at 12-13).

NMS' fleeting site is located along the Mississippi River approximately one-half mile downstream from Grafton, Illinois. Majestic limestone bluffs tower over the Mississippi River along the shoreline adjacent to the fleeting site. For nearly forty years the State of Illinois had sought to construct a highway at the foot of the bluffs to provide public access to these vistas. Its efforts finally succeeded in the early 1970s with the completion of a four-lane highway

with bicycle lanes between Grafton and Alton, Illinois, which lies to the south of Grafton. Using federal funds, the State had acquired scenic easements from and condemned land belonging to local landowners (including the land immediately upstream of this site) for the purpose of preserving the area's natural beauty. (AR, Vol. II, pp. 35, 67, *see also, Department of Public Works and Bldgs. v. Keller*, 61 Ill. 2d 320, 335 N.E.2d 443 (1975)). The scenic value of this area was recognized at the national level by Congressional designation of this highway as part of the Great River Road. The Great River Road is the National Scenic Highway, created by Congress in 1973 (23 U.S.C. § 148) in order to provide the public with ready access to scenic views and other unique features and recreational opportunities along the length of the Mississippi River from Lake Itasca, Minnesota, to the Gulf of Mexico. (23 C.F.R. §§661.4(b) and (e)) (AR, Vol. I, p. 256) (FOF at App. 54-55)

In its EA, the Corps conceded that the bluff and river areas at and downstream from the worksite provide some of the most impressive and unique vistas of any area along the Mississippi. (AR, Vol. I, p. 224) (EA at App. 39) Although barges fleeted at the site would block any view of the river from the 1500 feet of the highway adjacent to the site and for substantial distances up and downstream from the site, the Corps concluded that this scenic impact was insignificant. (AR, Vol. I, p. 224; Vol. II, pp. 40-63, 66-71 (EA at App. 39)

The Seventh Circuit determined that the Corps' consideration of the loss of these scenic vistas was adequate. *River Road Alliance, supra*, 764 F.2d at 451. (Seventh Circuit Opinion, App. at 10) The Corps' evaluation of this impact, however, focused solely on the 1500 feet of shoreline adjacent to the site. The Corps ignored the fact that

the fleeting area would mar the vistas available from substantial portions of the road up and downstream from the site. (AR, Vol. II, pp. 40-44; 66-71) The Corps and the Seventh Circuit also ignored the fact that the view along the four mile portion of the Great River Road nearest Alton was already blocked by several barge fleeting areas, making the project site one of the last unspoiled spots of natural beauty along the Mississippi River. (AR, Vol. II, pp. 71; 140-141; 159-160) The Corps also failed to consider whether introduction of another fleeting area along this portion of the Great River Road was consistent with the prior State efforts to preserve the scenic character of the area, focusing instead on the technical question of whether the barge fleeting violated the State's scenic easements. (AR, Vol. I, p. 256) (FOF at App. 54-55)

The vicinity of the fleeting area also serves as valuable habitat for certain increasingly threatened varieties of aquatic life. One of the largest remaining mussel beds in the Upper Mississippi and Illinois Rivers extends under and downstream of the fleeting site. (AR, Vol. I, pp. 64-66) Mussels are commercially harvested and play important roles in both the food chain for certain fish and birds and in the natural purification process of the river. (AR, Vol. I, pp. 64-66) The river bottom underlying and near the site also provides potentially irreplaceable overwintering habitat for catfish, one of the primary commercially harvested fish in the Upper Mississippi River. (AR, Vol. II, p. 151)

Both the United States Fish and Wildlife Service ("USFWS") and the Illinois Department of Conservation ("IDOC") objected strenuously to the project because of its potential adverse impacts on this aquatic life and habitat. These two agencies were concerned that towboat propeller wash accompanying the movement of barges into

and out of the site could severely disrupt or even destroy the mussel bed, either by burying the mussels under resuspended sediment or by striking or washing them away. (AR, Vol. I, pp. 64-66; 69-71) USFWS and the Illinois State Natural History Survey also noted that towboat propeller wash could damage habitat for overwintering catfish. (AR, Vol. I, pp. 268-272; Vol. II, p. 151)

The Corps' consideration of potential impacts on the mussel bed raised more questions than it answered. In response to the warnings of IDOC and USFWS, but without obtaining any input from those agencies, the Corps requested the applicant to conduct a mussel study. (AR, Vol. I, pp. 164-165) The applicant concluded that although "excessive sedimentation could eliminate virtually all of the mussel species" present in the bed (AR, Vol. I, p. 184), the fleeting area would not adversely affect the bed. (AR, Vol. I, p. 186) The Corps, USFWS, and IDOC each criticized the applicant's failure to obtain information essential to determining impacts—such as the amount of barge traffic in and out of the fleeting site, existing uses of the area, and the nature of the river bottom sediments. (AR, Vol. I, pp. 208; 219-222) The Corps itself challenged one of the applicant's key conclusions: that river bottom sediments resuspended by fleeting operations would not be deposited on the bed. (AR, Vol. I, p. 257) (FOF at App. 57) Nevertheless, the Corps failed to obtain the missing information or to reject the applicant's key conclusion. The Corps also declined to consider the project's impact on overwintering catfish in its EA and FOF. Nonetheless, the Seventh Circuit concluded that the consideration given these impacts was not arbitrary or capricious. *River Road Alliance, supra*, 764 F.2d at 452 (Seventh Circuit Op. at App. 11)

The Corps also refused to independently develop and evaluate any alternative sites for NMS's project as it was required to do under section 102(2)(E) of NEPA. NMS had claimed that no suitable alternative fleeting sites were available. The Corps itself rejected this claim as unsupported (AR, Vol. I, p. 258) (FOF at App. 58), but nonetheless failed to independently evaluate feasible alternatives with lesser adverse environmental impacts. (AR, Vol. I, p. 258) (FOF at App. 58) The Seventh Circuit found that the Corps could disregard its section 102(2)(E) duties in the absence of any efforts by petitioners to show that NMS had overlooked some plausible alternative site. *River Road Alliance, supra*, 764 F.2d at 452-453; (Seventh Circuit Op. at App. 12-13)

REASONS FOR ALLOWING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER WHETHER A REASONABLENESS OR ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW SHOULD BE APPLIED IN ASSESSING THE PROPRIETY OF AN AGENCY'S DECISION NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT UNDER THE PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

This case provides yet another opportunity[2] for this Court to resolve a longstanding conflict among the circuits

[2] On October 2, 1985, a petition for a Writ of Certiorari was filed in the case of *Dravo Basic Materials Co. v. Louisiana*, No. 85-569, asking this Court to grant certiorari for the same reason discussed here.

over the appropriate standard of review to be applied in determining whether a federal agency's decision not to prepare an environmental impact statement ("EIS") violates the provisions of the National Environmental Policy Act ("NEPA"). (42 U.S.C. §4321 *et seq.*) *See: Gee v. Boyd*, ___ U.S. ___, 105 S.Ct. 2123 (1985) (White, J., dissenting from denial of Certiorari).[3]

Section 102(2)(C) of NEPA (42 U.S.C. §4332(2)(C)) requires that an EIS be prepared for every major federal action significantly affecting the quality of the human environment. The majority opinion found that the permit issuance here was a major federal action, *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 450 (7th Cir. 1985) (Seventh Circuit Op. at App. 7-8), so the only remaining issue was whether this project had a significant impact on some aspect of the human environment.

At least two different standards are now being applied by lower federal courts in reviewing findings of no significant impact. The First, Second and Fourth Circuits, like the Seventh, will reverse such agency action only if it is arbitrary and capricious. *See: Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanley v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Webb v. Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983). The Fifth, Eighth, Ninth and Tenth Circuits, however, apply a "reasonableness" standard in reviewing an agency's finding of no significant im-

[3] In *Gee v. Boyd*, ___ U.S. ___, 105 S.Ct. 2123 (1985), Justice White stated in his dissent that certiorari should be granted to end this confusion among the circuits over what standard should be applied to an agency's decision not to prepare an EIS. (105 S. Ct. at 2126) Justice Brennan and Justice Marshall joined in Justice White's dissent.

pact. *See: Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-1249 (10th Cir. 1973).

The Third Circuit has assumed, without deciding, that a reasonableness test is appropriate. *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 741-742 (3d Cir. 1982). The Sixth Circuit requires a "reasoned determination" to support a finding of no significant impact, but has declined to choose between the two competing standards. *Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981). The Eleventh Circuit follows the reasonableness standard adopted by the Fifth Circuit since decisions of the Fifth Circuit rendered before October 1, 1981 are binding on it. *See: Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). The District of Columbia Circuit has arguably developed a third standard for reviewing such agency action. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-682 (D.C. Cir. 1982).[4]

[4] The District of Columbia Circuit applies a four-part test:

(1) Whether the agency took a "hard look" at the problem.

(2) Whether the agency identified the relevant areas of environmental concern.

(3) As to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant.

(4) If there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. (*Cabinet Mountains Wilderness, supra*, 685 F.2d at 682).

This conflict among the circuits is not merely semantic or academic. *Gee v. Boyd*, ____ U.S. ____, 105 S.Ct. 2123, 2125 (1985) (White J., dissenting from denial of certiorari); *Fritiofson v. Alexander*, 772 F.2d 1225, 1237 (5th Cir. 1985). It has been recognized by the courts and commentators alike that greater deference to an agency's decision is usually given under the arbitrary and capricious test than under the reasonableness test. *See, e.g. Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982); Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. Envtl. Aff.L. Rev. 63, 79 (1980). It is for this reason that a more rigorous standard of review has been developed by the Fifth, Eighth, Ninth and Tenth Circuits in order to insure that the purposes for which NEPA was enacted would be carried out by federal agencies. That standard should have been applied by the Seventh Circuit in this case.

NEPA reflects congressional concern with environmental degradation and its long-term adverse effects on biological survival and the quality of human life. NEPA establishes substantive goals consistent with those concerns, and creates a framework for accomplishing those goals. The purposes of the statute are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation * * *. (42 U.S.C. §4321)

Section 101 provides that it is the federal government's "continuing responsibility . . . in cooperation with State

and local governments" to use all practicable means to conduct itself as a trustee of the environment for future generations, to avoid as far as possible environmental degradation, to assure for all Americans esthetically pleasing surroundings, to preserve important historic, cultural, and natural aspects of our national heritage, and to achieve an appropriate balance between population and resource utilization. (42 U.S.C. §4331) Section 102 expressly directs that, "to the fullest extent possible," federal regulations and laws be "interpreted and administered in accordance with the policies of [NEPA]", and that all federal agencies take an interdisciplinary approach in making decisions which bear on the environment, and develop procedures to insure that "unquantified environmental amenities and values" are considered in decision-making along with economic and technical considerations. (42 U.S.C. §§4332(1), 4332(2)(A)(B))

In addition, section 102 establishes the primary "action-forcing" procedural mechanism by means of which federal agencies implement the statute's substantive goals and policies. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Com'n.*, 449 F.2d 1109, 1112-1113 (D.C. Cir. 1971). This mechanism is what is commonly referred to as the Environmental Impact Statement which must be prepared for every major federal action significantly affecting the quality of the human environment. (42 U.S.C. §4332(2)(C)) The preeminent purposes of this process are to force federal agencies to take a "hard look" at the environmental consequences of a proposed project, consider viable alternatives to the method chosen to achieve the aims of the project, and endeavor to minimize adverse environmental consequences of the proposal. *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 431-432 (5th Cir. 1985).

A federal agency's finding of no significant impact, however, pretermits this fact-gathering process designed by Congress to ensure that environmental concerns are considered "to the fullest extent possible." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *State of Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3254 (U.S. Oct. 2, 1985) (No. 85-569). Hence, "the spirit of the Act would die aborning if a facile, ex-parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Save Our Ten Acres v. Kreger, supra*, 472 F.2d at 460. Consequently, the more searching reasonableness standard should be applied in reviewing a finding of no significant impact to ensure that federal agencies have lived up to the high standards set by NEPA to take a "hard look" at every potential environmental effect of a proposed project. *See, e.g., Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 439 n.19 (5th Cir. 1985).

Under the reasonableness standard, an environmental plaintiff has the initial burden of alleging facts that show that a project *may* significantly degrade some human environmental factor. *State of Louisiana v. Lee, supra*, 758 F.2d at 1084; *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1392 (9th Cir. 1985). Once this burden is met, the court reviews the administrative record to determine whether the agency reasonably concluded that the project would have absolutely no effects which would significantly degrade any aspect of environmental quality. *State of Louisiana v. Lee, supra*, 758 F.2d at 1085. If the Court concludes that no environmental factor would be significantly degraded, the agency's decision is upheld. *State of*

Louisiana v. Lee, supra, 758 F.2d at 1084. But, on the other hand,

> . . . if the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all) the court should require the filing of an impact statement or grant (the plaintiff] such other equitable relief as it deems appropriate. *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 467 (5th Cir. 1973).

The Court, therefore, need not determine whether the project would degrade *every* aspect of environmental quality, but merely whether the project might affect above a minimal level a *single* environmental factor. *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 432-433, 439 (5th Cir. 1985).

An application of the reasonableness standard in this case demonstrates that the Corps improperly concluded that NMS's project would have absolutely no effects which would significantly degrade any aspect of environmental quality, and therefore, failed to take a "hard look" at the consequences of its actions.

Here, petitioners raised a substantial environmental issue concerning the project's impact on the aesthetic values of this area. Majestic limestone bluffs tower over the Mississippi River along the shoreline adjacent to the site chosen by NMS to fleet its barges. At the foot of these bluffs, Illinois has constructed a highway providing public access to these magnificent vistas and, using federal funds, has sought to preserve the great natural and scenic beauty of this portion of the highway. The aesthetic value of this area was recognized at the national level by Congressional designation of this highway as a portion of the Great River Road, the only National Scenic Highway. The

portion of the Great River Road affected by NMS's project has been enjoyed by millions of people, many of whom use it as the main access route to Pere Marquette State Park, one of the most heavily visited parks in Illinois with over one million visitors each year. The public also uses the Great River Road for biking, hiking and jogging in lanes specially provided for these purposes.

The fact that the instant project may affect this environmentally sensitive area is not seriously disputed by Respondents and, indeed, was conceded by the Seventh Circuit in its majority opinion. The majority opinion found that this project would be "an unfortunate eyesore marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi River * * *." *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army,* 764 F.2d 445, 450 (7th Cir. 1985) (Seventh Circuit Op. at App. 7) This adverse impact consists in the obstruction of the scenic views from the Great River Road, and the introduction of an industrial activity into a previously undisturbed natural setting. Precisely this kind of aesthetic and visual degradation of the human environment is a matter of Congressional concern under NEPA. *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 439 (5th Cir. 1985); *See also: Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1322 (8th Cir. 1974). Had the Seventh Circuit applied the reasonableness standard under these circumstances, it would have been compelled to conclude that NMS's project might significantly degrade the human environment and to hold that the Corps unlawfully issued a finding of no significant impact.

Petitioners also raised substantial environmental issues concerning the project's impact on aquatic life at the project site. One of the last remaining large mussel beds in the Upper Mississippi River lies beneath and downstream

of the NMS site. The Corps required NMS to study whether the fleeting site would significantly affect the mussel bed. NMS found that excessive sedimentation (i.e. resuspension of river bottom sediments by towboat propeller wash and subsequent redeposition) could eliminate virtually all of the fourteen mussel species present in the bed, and that even moderate accumulations could eliminate six of the fourteen species and reduce the population to approximately one-half of its present level.

Having thus identified the levels of sedimentation at which significant impacts would occur, neither the applicant nor the Corps made any effort to determine the extent of sedimentation likely to occur here. Neither took samples of the river bottom sediments at the site, nor obtained information about the amount of barge traffic expected to move in and out of the site. The USFWS questioned the failure to acquire the first type of information and the Corps' own environmental expert questioned the failure to obtain the latter. Contrary to its own regulations, the Corps did not attempt to supply the applicant's missing data or to gauge the amount of sedimentation to be expected or the extent of its impact on the mussel bed before issuing the finding of no significant impact. 33 C.F.R. §230.7(e) and Appendix B, par. 8(b). The omission of any meaningful consideration of such fundamental matters demonstrates that the Corps unreasonably concluded that this project would have no significant impact on this aspect of the environment. *See: Foundation for North American Wild Sheep v. United States Dep't. of Agriculture*, 681 F.2d 1172, 1177-1179 (9th Cir. 1982).

The Corps attempted to mitigate the project's impact on the mussel bed by conditioning continued operations on the absence of significant damage to the mussel bed. (AR, Vol. I, p. 315) However, by placing this condition

on the permit, it is clear that the Corps impliedly found that this project *could* in fact affect the mussels above a minimum level. The Corps' "wait and see" attitude is irrational and represents the very type of agency conduct unacceptable under NEPA. *Foundation for North American Wild Sheep v. United States Dep't. of Agriculture, supra*, 681 F.2d at 1181.

Moreover, as the record of the Corps' public hearing indicates, fleeting activities at the site may significantly degrade habitat for overwintering channel catfish. USFWS, as well as an aquatic biologist with the Illinois Natural History Survey, argued that overwintering catfish could be adversely affected by fleeting activities and that channel catfish had diminished greatly in recent years, indicating that further potential impacts on catfish should be closely scrutinized. The Corps, however, did not consider this potential impact in either its EA or FOF (App. 38-42; 43-67), and therefore, its finding of no significant impact was unreasonable.

The above discussion shows how the instant petitioners, and indeed all environmental plaintiffs, would benefit from an application of the reasonableness test in reviewing an agency's finding of no significant impact and its decision not to prepare an EIS. Because NMS's project might negatively affect, above a minimal level, the aesthetic and aquatic values identified in this case, the Corps unreasonably concluded that this project would have absolutely no effects which would significantly degrade any aspect of environmental quality. Therefore, had the Seventh Circuit applied the reasonableness standard, it would have been required to hold that the Corps unlawfully issued

a finding of no significant impact for NMS's project, and to direct the Corps to prepare an EIS.[5]

This case provides an opportunity for this Court to resolve the conflict among the circuits over the review standard to be applied in these circumstances. Therefore, certiorari should be granted to articulate a test to ensure that federal agencies live up to NEPA's high standards by adequately considering to the fullest extent possible the potential environmental effects of proposed projects.

II.

CERTIORARI SHOULD BE GRANTED TO REVERSE THE SEVENTH CIRCUIT'S DECISION JUDICIALLY REPEALING SECTION 102(2)(E) OF THE NATIONAL ENVIRONMENTAL POLICY ACT BY ALLOWING A FEDERAL AGENCY TO DISREGARD ITS STATUTORY DUTY TO ASSESS ALTERNATIVES WHENEVER A PERMIT APPLICANT CLAIMS THERE ARE NO FEASIBLE ALTERNATIVES TO ITS PROPOSED PROJECT AND THE ENVIRONMENTAL PLAINTIFF HAS NOT PROPOSED A FEASIBLE ALTERNATIVE OVERLOOKED BY THE PERMIT APPLICANT.

The action of the Seventh Circuit has produced a question of first impression and national importance concerning the affirmative duties of a federal agency under section 102(2)(E) of NEPA. Section 102(2)(E) obliges agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." (42 U.S.C. §4332(2)(E))

[5] Petitioners also raised substantial environmental issues concerning adverse effects on the historic towns of Elsah and Chautauqua and recreational activities. Under the reasonableness standard, the impacts on these concerns would not need to be analyzed on judicial review because petitioners have already shown that this project may significantly affect some environmental factor. The Corps, however, would be required to address these other concerns in its EIS. *Citizen Advocates For Responsible Expansion v. Dole*, 770 F.2d 423, 439, n.20 (5th Cir. 1985).

In an unprecedented decision, the Seventh Circuit has determined that where a permit applicant claims there are no feasible alternatives to its proposed project, the federal agency may disregard its statutory duty to assess alternatives unless an environmental plaintiff proposes a feasible alternative overlooked by the applicant. This ruling is contrary to the plain language of section 102(2)(E) and undermines NEPA's goal of ensuring that agencies are fully informed of the environmental consequences of their actions.

In enacting section 102(2)(E),

> [Congress] intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or accomplishing the same result by entirely different means. (*Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1975))

The object of this provision is,

> [to] ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely the most intelligent, optimally beneficial decision will ultimately be made. (*Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Com'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971))

Contrary to this express intent of section 102(2)(E), the Seventh Circuit has now decided that an agency's duty to "study, develop, and describe" alternatives is satisfied by allowing the permit applicant alone to select and reject alternatives. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 446-447 (7th Cir. 1985) (Seventh Circuit Op. at App. 12-13) Not only does this new rule ignore the applicable statutory language which creates an *agency* obligation, not an *applicant* obligation, but it defies common sense. It is obvious that a permit applicant has no incentive to find a site or course of action which is less convenient than the one he is pursuing with the agency. Finding a feasible alternative with less adverse environmental impact can only jeopardize his application for the site which he prefers. In other words, an applicant's own economic self-interest precludes an objective assessment on his part of the alternatives. As Judge Wood cogently noted in his dissent: "Permitting the company by itself and for itself to find and propose an alternative site less convenient for its pocketbook is a little like consulting the fox about the best location for the chicken house." *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army, supra*, 764 F.2d at 457-458. (Wood, J., dissenting). (Dissenting Op. at App. 22)

Section 102(2)(E) was enacted to infuse an objective viewpoint into the balancing of the applicant's private economic interests with the public's interests in environmental quality and biological survival. For this reason, the courts have consistently held that the agency's responsibilities under NEPA are primary and non-delegable, and that the agency must independently evaluate alternatives submitted by an interested party. *Steubing v. Brinegar*, 511 F.2d 489, 496 (2d Cir. 1975); *Sierra Club v. Hodel*, 544 F.2d 1036, 1043-44 (9th Cir. 1976); *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 94 (2d Cir. 1975). The

Corps' own NEPA-implementing regulations require the Corps to independently verify information provided by an applicant, 33 C.F.R. part 230 App. B, pars. 8(a), (b), as do the regulations of the Council on Environmental Quality, 40 C.F.R. §1506.5(a), (b).[6] If, as the courts have said, the alternative assessment is the "lynchpin" of the NEPA process, (*NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975), no other approach makes sense.

In this case, the Corps itself rejected the applicant's analysis of alternatives, finding that it was insufficiently broad and thorough:

> [W]e believe several prospective fleeting sites could be found as alternatives to [the applicant's] proposed site at Grafton . . . [W]e do not concur in applicant's conclusion that alternative sites do not exist. (AR, Vol. I, p. 258) (FOF at App. 58)

Having rejected NMS's conclusion that no alternatives exist, the Corps nonetheless chose to approve NMS's application without itself seeking any information about the availability of any environmentally sounder alternative site. In this manner, the Corps not only violated the mandate of Section 102(2)(E), but assured that an objective attempt to find alternatives and balance public and private needs would not be made.[7]

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[6] The majority opinion held that the Council's regulations are "nondirective". (764 F.2d at 450) (Seventh Circuit Op. at 8). This holding conflicts with rulings from other circuits which have found these regulations to be binding on federal agencies. *E.g., Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984); *State of Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3254 (U.S. Oct. 2, 1985) (No. 85-569).

[7] The Corps justified its action on the ground that alternative fleeting sites would not be as convenient for NMS as the site NMS chose. (AR, Vol. I, p. 258) (FOF at App. 58). However, the

(Footnote continued on following page)

In its opinion in this case, however, the Seventh Circuit sanctioned this highly irregular conduct by ruling that it was up to the environmental plaintiffs, not the Corps, to "shoulder the burden" of proposing alternative sites. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 452-453 (7th Cir. 1985) (Seventh Circuit Op. at App. 13) This ruling is inconsistent with the fundamental thrust and purpose of NEPA. NEPA was enacted for the benefit of the public and imposes affirmative duties on federal agencies, as "trustees of the environment for future generations," to evaluate the environmental consequences of their actions. (42 U.S.C. §4331) These duties are imposed on the federal agencies, and not on the concerned public for whose benefit NEPA was enacted. *Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972).

In this case, the Seventh Circuit read section 102(2)(E) out of NEPA. Where the interested party is given the responsibility for protecting the public's interest and where the public's interest conflicts with its own, NEPA has been judicially repealed. Certiorari should be granted to address this action of the Seventh Circuit and to resurrect NEPA's mandate to the federal agencies.

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[7] *continued*
fact that an alternative site may not be as convenient as the one the applicant prefers does not mean that the alternative site is not feasible and does not strike a reasonable balance between public and private needs.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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